to be idle, pursue their occupations as usual. The libellants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston, ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston, (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

On the whole, we are of opinion that the bark Tangier has made good delivery of her cargo to the consignees according to the exigency of her bill of lading, and that the decree of the Circuit Court should be reversed, and the libel dismissed with costs.

In the Supreme Court of Pennsylvania.

COMMONWEALTH EX REL. R. G. HAMILTON *vs.* THE SELECT AND COMMON COUNCILS OF THE CITY OF PITTSBURG, COMPOSED OF D. FITZSIMMONS, ET AL.

1. Mandamus is the proper and appropriate writ to compel a municipal corporation to make provision for the payment of interest due upon bonds issued by the same in payment of its subscription to the stock of a railroad company, by the assessment and collection of the necessary taxes.
2. Mandamus is the proper remedy where there is a clear legal right in the relators, a corresponding duty in the defendant, and a want of any other adequate and specific remedy.

The opinion of the court was delivered by

STRONG, J.—The alternative mandamus in this case, following the suggestion of the relator, avers that he is the owner of two certificates of loan or bonds of the city of Pittsburg, each for the sum of one thousand dollars, the ownership of which he acquired by purchase; that these certificates of loan or bonds, with others,

amounting in all to the sum of $150,000, were issued by the said city in payment of a subscription for three thousand shares of the capital stock of the Chartiers Valley Railroad Company; that all the bonds are signed by the Mayor of the city, countersigned by the Treasurer, and sealed with the city's corporate seal; and that they pledge the faith, credit and property of the said city of Pittsburg for the payment of the principal and interest thereof. It is further averred that, by an act of Assembly, approved February 7, 1853, the organization of the Chartiers Valley Railroad Company was authorized, and the city of Pittsburg was empowered, to subscribe to the capital stock of said company, not exceeding the number of five thousand shares; to borrow money for the payment of such subscription, and to make provision for the payment of the principal and interest of the money so borrowed, by the assessment and collection of such tax as may be necessary for that purpose, as in other cases of loans to corporations. It is further averred, that the act of Assembly provided that the subscription to the stock should be directed by resolution passed by the corporate constituted authorities of said city, and that accordingly the Councils thereof, by ordinance passed the 27th day of June, 1853, authorized and directed the Mayor to subscribe, in behalf of the city, three thousand shares of the capital stock of said company, and to make and execute bonds for the payment of such subscriptions. Still further, it is averred that the bonds were duly transferred in accordance with the act of Assembly, and that a large amount of interest is now, and has been for a long time past, due and payable upon them, but that the city of Pittsburg has wholly neglected and refused to pay said interest so due, or to make any provision whatever for the payment thereof, and that, under the acts of Assembly, it is the duty of the Select and Common Councils of the said city, in each and every year, to provide for the payment of said interest by the assessment and collection of such taxes as may be necessary for the purpose, but that they have wholly and wrongfully neglected to make any provision whatever for the payment, notwithstanding the holders of the bonds or certificates of loan have demanded and endeavored to procure payment.

We shall spend no time in endeavoring to prove what is apparent upon the face of this statement of facts, that it presents a fit case for a mandamus. Here is a clear legal right in the relator, a corresponding duty in the defendants, and a want of any other adequate and specific remedy. No action at law would lie at the suit of the relator against the defendants for not making provision for the payment of the interest, for not levying and collecting a tax, which is the thing sought to be accomplished by this writ. That an action might be brought against the city upon the bonds themselves, is true, but that is not the right here asserted, nor would it enforce the duty alleged. The liability of the city to pay the bonds is one thing, the duty of the Councils to make provisions for their payment is quite another. The City Councils are public bodies, and the members of the Councils are public officers. Nothing is better settled than that mandamus is the appropriate writ by which the Commonwealth compels the performance of a public duty. The propriety of this form of remedy for such a case as this relator presents, was fully vindicated in *Commonwealth ex rel. Thomas* vs. *The Commissioners of Allegheny Co.*, 8 Casey, 218, and both English and American authorities were referred to in support of its use. Cases are numerous in which the writ has been sustained to enforce the levy and collection of a tax. *Queen* vs. *The Wardens of the Parish of St. Saviour*, 7 Ad. & El. 925; *Queen* vs. *The Select Vestrymen of St. Margaret*, 8 Ad. & El. 889; *Queen* vs. *Thomas*, 3 Com. Bench, 589. Tapping, in his Treatise on Mandamus, says, page 67: "The writ has often been granted to command church-wardens to make and raise one or more rates for the re-payment of principal money, with interest, borrowed on the credit of the parish and church rates." So it has been granted to command justices to tax, rate and assess a parish for the support of the poor. In the case of *The Justices of Clark* vs. *The Paris, &c., Turnpike Road Co.*, 11 B Monroe, 143, it was decided that mandamus was the appropriate and only remedy for compelling compliance with a duty to levy money to pay a subscription to the stock of a turnpike road company. In *Maddox* vs. *Graham & Knox*, 7 American Law Register 744, it was applied by the Court of Appeals of Ken-

tucky to a case in all essential particulars like the present. Many other similar decisions might be quoted. If, then, the relator is the owner of some of the bonds upon which interest is due and payable, and if it be the duty of the defendants to make provision for the payment of the interest by levying and collecting a tax, a duty which they have neglected and refused to perform, it is no novelty that they are called upon by the writ of mandamus to discharge that duty. The novelty is in the necessity for the writ, and not in the writ itself.

Before entering upon an examination of the return made by the defendants to the alternative writ, it seems proper to dispose of the objections urged against the writ itself. They are eleven in number, and all of them are merely formal. The first is that it does not aver or set out any law conferring authority upon the city of Pittsburg to make provision for the payment of bonds, or interest accruing thereon, by assessing and collecting taxes, but avers that a subscription was made, and that bonds were issued in payment of said subscription, without showing any authority of law for the issue of bonds for that purpose. The writ does, however, aver authority in the city of Pittsburg, conferred by an act of Assembly, to subscribe to the capital stock, to borrow money to pay for the subscription, and to make provision for the payment of the principal and interest of the sum so borrowed, by the assessment and collection of a tax. A power to borrow money, surely, it need not be argued, includes the power to give bonds or other usual securities to the lender. We cannot be expected to decide that the bonds are illegal, because the act of Assembly did not specify what securities might be given for the money borrowed, or that a power to borrow money to pay a debt, including, as it does, the power to issue bonds, is not executed by giving bonds to the creditor. In substance, the money is borrowed from the purchasers of the bonds; it is advanced on the faith of the city's obligations, for the very purpose for which the city was authorized to raise it. Apart from the fact that the act of Assembly referred to in the writ authorized the bonds issued for the purpose of borrowing the money, to be given and received in payment of the subscription, it is to be observed that they were

in fact made payable to bearer, that they might readily pass from hand to hand. The Chartiers Valley Railroad Company may therefore well be considered the agent of the obligors, to raise money upon their obligations. It has never before been doubted, that he is a borrower who executes his bonds payable to bearer, and then, by his agent, sells them in the market.

It is next objected, that the writ does not set out when the principal of the bonds is payable, what rate of interest they bear, or the time and place at which it is payable. No attempt has been made to inform us why such allegations are needful. The date of the bonds, the fact that they do bear interest, (which, of course, is legal interest, when no other rate is mentioned,) the fact that interest is in arrear, the fact that the relator is the owner of some of the bonds, and the fact that the defendants have made no provision for payment, but have wholly neglected and refused to make provision, although it is their duty, by law, to make it, are averred, and if these averments of fact be true, the right to a peremptory mandamus is complete. The respondents are not now asked to make provision for the payment of the principal, nor are they, by this proceeding, required to pay even the interest. The demand of the writ is only that they provide for the payment of the interest. To a compliance with this demand, it is of no consequence that the writ should state when the principal will become payable, or when or where the interest is to be paid.

The next objection is that the writ does not set out the relator's title to the bonds, but simply avers that he became the purchaser, without stating how they were transferred, or the consideration paid by him. The averment of ownership of the bonds of the relator is only necessary to show his right to ask the interference of the court by mandamus. If he has a legal right, no matter how he acquired it, it is all that the law demands. The amount of the consideration paid by him on his purchases, or the mode in which the bonds were transferred to him, are quite immaterial to the question whether he has a legal right. But the writ does aver that the bonds were purchased by the relator, and that he holds them in his own right, and

it also asserts that they were duly transferred in accordance with the act of Assembly.

The fourth exception is, that the relator alleges that coupons for the interest were attached to the bonds, but does not aver that he is either the purchaser or holder of any of the coupons, while the copy of the bond attached to his affidavit shows that the interest is only payable on the presentation of the coupons. If the exception means any thing, it is that the relator's legal right is not sufficiently averred. It is, however, set out that he is the purchaser and holder of bonds bearing interest, and that all the bonds have coupons attached. The ownership of the bonds necessarily includes the ownership of the right to the interest secured by them, and of the coupons attached, which are themselves part of the securities. The writ does, therefore, aver sufficiently the relator's title to the inteterest, which the defendants neglect and refuse to provide for.

It is next urged that the writ is insufficient, because it contains no averment that any demand was ever made upon the Councils to make provision for the payment of the interest alleged to be due, by the assessment and collection of taxes for that purpose. It is, undoubtedly, the general rule that the writ should contain an averment of a demand and refusal. The reason assigned is, that it should appear that the defendants have had the option of doing or refusing to do that which is required of them before the application be made to the court for compulsory process. This is a right of the defendants; but, like all other rights, it may be waived. The law never requires a vain thing. Thus, in cases where a tender is necessary, if the party to whom it is due declares that he will not accept it, none need be made. A readiness to make it in such a case, is all that is required. Here the writ avers, not alone that the defendants have neglected, but that they have refused to make any provision for the payment of the interest. The allegation is that they have had their option, (all which a demand is intended to give,) and that they have chosen to refuse. That a precise demand is not necessary in all cases, is shown in *Regina* vs. *Tindall*, 1 Ad. & El., N. S. 386; and, in regard to a refusal, any thing which shows that the defendant does not intend to perform the duty, is sufficient

to warrant the issue of a mandamus; 4 B. & Ad. 530; 10 A. & E 561; 8 A. & E. 889, 901; *Maddox* vs. *Graham*, supra.

The sixth exception taken to the writ is, that it contains no reference to any act or law which makes it the duty of the Select and Common Councils of the city of Pittsburg, or the defendants, to assess taxes for any purpose. Even if it were necessary to refer to and recite the particular act of Assembly, which imposes upon the defendants the duty, the performance of which the writ commands, it is a sufficient answer to this exception that it is not founded in fact.

The writ avers that, by virtue of the act of February 7, 1853, and also the act of Assembly conferring upon the Select and Common Councils of the city of Pittsburg, power to assess and collect taxes for the use of the said city, it became their duty to provide for the payment of the interest upon the bonds, by the assessment and collection of such taxes as may be necessary for the purpose. It is absurd to argue that conferring such a power is imposing no duty. The Select and Common Councils are public agents, created to perform a public trust. One of the purposes of their creation is that they may provide for the payment of the debts of the city. It is true that the act of February 7, 1853, only declares that the city "shall have power" to make provision for the payment of the principal and interest of the money borrowed, by the assessment and collection of a tax, but, in a statute, the word *may* means *must* or *shall*, in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure*, that the power should be exercised. Thus, in *Rex* vs. *Barlow*, 2 Salk. 609, church-wardens were indicted for not making a rate or assessment under the statute of 14 Charles II., for the reimbursement of some constables. The words of the statute were, they "shall have power and authority to make a rate," but the statute was construed to be peremptory, imposing a duty, because the constables had an interest in the exercise of the power. In *King* vs. *The Inhabitants of Derby*, Skinner 370, it was said that *may*, in the case of a public, is tantamount to shall. In *Newburgh Turnpike Co.* vs. *Miller*, 5 Johns. Cha. 113, it was

said that, whenever an act to be done under a statute is to be done by a public officer, and concerns the public interest, or the rights of third persons, which require the performance of the act, it then becomes the duty of the officer to do it; *Malcom* vs. *Rogers*, 5 Cowen, 188, is to the same effect. The duty of the city is, therefore, imperative, to assess and collect taxes, and the power and corresponding duty are, by one of the acts referred to, devolved upon the Select and Common Councils.

It is a sufficient answer to the seventh objection to the writ, that the act of February 7, 1853, directs that provision be made for the payment of the principal and interest of the debt incurred by the subscription, *by the assessment and collection of a tax.* The case is very unlike *King* vs. *Margate Pier Co.*, 3 B. & A. 220. That was a mandamus to a corporation, commanding them to pay a poor rate. The ordinary remedy was a distress, and the writ omitted to state that the defendants had no effects upon which a distress could be levied. But here the writ avers, that by reason of the neglect and refusal of the defendants to perform their legal duty, *i. e.*, that of making provision, the relator has been unable to recover the amount of interest now, and for a long time past, due and unpaid.

The eighth exception is, that the writ does not sufficiently aver the want of other legal remedy. It does, however, distinctly assert that the relator cannot have adequate relief without the aid of a writ of mandamus, and no more need be averred. It is all which was alleged in the case of *Commmonwealth ex rel. Thomas* vs. *The Commissioners*, and the averment was then held sufficient.

The ninth exception is, that the mandate is to provide for interest not yet due, and which may never become due, and therefore anticipates a future violation of duty. The mandamus is to make provision for the payment of all the interest due when the writ issued, and all that should become due during the year 1859. Providing for the interest due, and all that would become due while the defendants are in office, is in reality one duty, and a refusal to take the first step, is a refusal to perform any part of the duty.

The tenth objection is, that several parties, claiming under differ-

ent rights, are joined in the same writ. This a mistake of the fact, and therefore needs no further notice.

The eleventh and last exception is, that the writ does not mention the amount of interest due, or for which provision is to be made. It is, however, in this respect, sufficiently certain. It describes the bonds, their date and amount; they are bonds of the city of Pittsburg. From the necessity of the case, the amount of unpaid interest must be known to the obligors. The extent of their duty is, therefore, defined. In this particular, the writ is like that in *Thomas's Case*, which was ruled to be sufficient.

This is all which need be said respecting the objections urged against the writ itself. They are all thoroughly technical, and many of them have been heretofore held by this court to be unavailing; 8 Casey, 218.

We pass now to the return made to the alternative writ. Several matters are alleged as reasons why the duty which the writ seeks to enforce has not been performed, and why a peremptory mandamus should not issue. The first is an objection to the jurisdiction of this court. That jurisdiction is, by the Constitution, declared to be coextensive with the State. The power to issue writs of mandamus has always been exercised by the court, and recognized as an existing power again and again by the legislature. We do not understand this to be denied; but it is contended that the court, while sitting in the eastern district, is not authorized to send its writ to the defendants, who are resident in the western district. The State, it is true, has been divided into four districts; but for what purpose? It was not to limit the jurisdiction of the court, or to restrict the range of its writ. The districts were created, as the act of Assembly declares, solely for the purpose *of holding* the Supreme Court, and the judges are required to hold terms in each district. If this be the object of division into districts, it can have no effect upon the range of the court's writs. Were there no such division, it would hardly be claimed that the writ might not go to any part of the State, from the place where the court might be in session. Accordingly, it has been ruled, that the Supreme Court, at its session in either of its districts, may issue writs of mandamus

to any part of the State; 9 Har. 9. And, indeed, it must be so; for if these writs, and writs of quo warranto, did not run beyond the limits of the district in which the court is in session, there would be, in many cases, a failure of justice. The ruling in 9 Harris, 9, was followed in *Thomas's Case*, and is no longer open to question. Nor certainly can there be any reason to complain, when the defendant is heard within the district in which he resides.

The next averment of the return is, that there is no such corporation or body politic known to the law as the city of Pittsburg, of whose Councils, Select or Common, the persons named in the writ are supposed to be members, but that the corporate name is "The Mayor, Aldermen, and Citizens of Pittsburg." The writ is directed to the Select and Common Councils of the City of Pittsburg, composed of D. Fitzsimmons and others, defendants. It is not directed to the city, but to the individuals who constitute the Select and Common Councils. The question is not, therefore, whether, if an action had been brought at law against the City of Pittsburg, the misnomer might have been pleaded in abatement, for it is not the corporation which is sued. But even if it were, the mistake is amendable. Formerly, when the doctrine of amendments remained as at common law, the court would not allow a writ of mandamus to be amended after return filed; but, as is said by Tapping, page 334, the strict rule of the common law has been of late years altogether departed from; the principle as to amendment which now obtains being that it shall be allowed in all cases, when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection. *Rex* vs. *Newbury*, 1 Q. B. 759. It needs no argument to prove that justice would not be promoted by turning the relator out of court because he has described the defendants as members of the Select and Common Councils of Pittsburg, instead of members of the Select and Common Councils of "The Mayor, Aldermen, and Citizens of Pitsburg." Even the very act which incorporated the city more than once denominates it the city of Pittsburg. One of our statutes of amendments authorizes an amendment of the record of

any action in any stage of the proceedings when it shall appear by any sufficient evidence that a mistake has been made in the Christian name or surname of any party, plaintiff or defendant. As statutes of jeofails are construed liberally, it would seem to be within the spirit of this act to allow an amendment of a corporate name, when a corporation is a party. But, whether it would or not, need not now be decided, for the mandamus is not to the artificial being known either as the city of Pittsburg or as "The Mayor, Aldermen, and Citizens of Pittsburg." It is not, therefore, misdirected.

The third averment of the return is somewhat similar to the second. It is in substance, that by none of the acts of Assembly mentioned is the corporation known by the name and style of "The Mayor, Aldermen, and Citizens of Pittsburg," authorized to subscribe for stock of the said railroad company, or to issue bonds therefor, or to make provision for the payment of the principal and interest thereof. It is not denied that such authority was conferred upon the city of Pittsburg; nor indeed could it be, for it is, in direct terms by the act of February 7, 1853. What is this, then, but an evasive averment? In construing the statute, we are to give effect to the legislative intention, and, in speaking of the corporation, it is generally denominated the city of Pittsburg. This is its common name in the numerous statutes which have been passed conferring upon it privileges, and it has never before been doubted what the legislature intended. Thus, among many instances, when, after a great fire, a State appropriation was made for the relief of the sufferers, it was made only for the sufferers by the fire in the city of Pittsburg, and was directed to be paid to the Mayor and Select and Common Councils of the said city. Who questioned then that this was a benefit conferred upon the Mayor and Aldermen and citizens of Pittsburg? We should justly be regarded as trifling with statutory enactments were we to hold that the act of 1853 did not confer upon the municipal corporation the power to subscribe for stock, to issue bonds, and to make provision for the payment of the principal and interest thereof.

Next is it pleaded that the Select and Common Councils, of

which the defendants are members, are by law deliberative and legislative bodies only, possessed of an entire discretion in the exercise of all the power committed to their hands, subject to no control whatever beyond their own sense and convictions of duty, so long as they are acting within the legitimate sphere of the powers conferred upon them. This is, at most, a denial of the legal duty which the writ charges to be resting upon them, coupled with a negation of the right of this court to control their discretion. It may be admitted that, if respondents have an option to do one thing or another, courts will not award a mandamus to compel one thing to be done. They cannot be compelled to exercise their discretion in a particular way. Yet even a judicial officer, as has often been decided, may be commanded to proceed to judgment—an arbitrator to make an award—though what the judgment or award may be, the court will not direct. Tapping, 109. But this is not a case in which the defendants have any discretion. This averment, in their return, mistakes their legal duty. It is not an obligation to consider, to use a discretion, but it is an obligation to act. The sixth section of the act of February 7, 1853, gave them power to make provision for the payment of the principal and interest by the assessment and collection of such tax as may be necessary for that purpose. As they are public officers, and as the relator is interested in their thus making provision, the possession of the power brings with it the duty to exercise it, their discretion is taken away. This has already been shown by our remarks upon one of the objections taken to the form of the writ, and the authorities need not again be cited.

Next, the return avers that the Select and Common Councils are not integral parts of the corporation, but only several and co-ordinate branches of the legislature thereof, acting separately and independently of each other, that the concurrence of both bodies is essential to the validity of all legislative acts affecting the corporation, and that the defendants are without power of themselves to assess or impose taxes, or to compel the concurrence of the other branch of said Councils in any act. We do not perceive that this is any answer to the mandate of the writ, and no attempt has been

made to show us how the fact averred is material. The defendants are all the members of both branches, and, if each discharges his duty, there can be no want of concurrence of Councils.

The sixth averment of the return reciting the act of 1853, and the ordinance authorizing the subscriptions, and after admitting that the subscription was made as averred in the writ, and that bonds were given to the company for the amount, proceeds to charge that the act of Assembly provided that the bonds should be transferable in such manner as should be directed by the city, and that they might be received by the company in such manner as might be agreed upon between the parties. The defendants then aver that no money was borrowed to pay for the stock; but that the bonds were made payable, and actually delivered, to the company itself, and that no direction was given by the corporation as to the manner in which the bonds should be transferable.

How does all this negative the liability of the defendants to make provision for the payment of the interest? Conceding the facts alleged, as the demurrer does, it is only by drawing an erroneous inference of law from those facts that they became of any importance. We have already shown that giving the bonds to the company in payment, was a mode of borrowing authorized by the act. But the payment to the company, by the bonds, was expressly authorized. It would be a most illiberal construction, even if it were not so, to hold that the power to assess a tax was conferred only in case the money should be borrowed from third persons and paid to the company.

The other assertion of fact, that the city did not direct how the bonds should be transferred, if it means any thing, is a blow at the title of the relator; but it is not denied in any part of the return that they were made payable to bearer, and therefore that they passed by delivery, or that they were thus made by the agents of the city. This obviously amounts in effect, though not in words, to a direction of the mode in which they should be transferred. When, therefore, it is averred that there was no direction, it can only be intended that there was none by express ordinance. The averment is, therefore, wholly immaterial. It would be allowing a gross

fraud, if, after the city has executed its bonds, affixed to them its corporate seal, made them payable to bearer, and sent them out to find purchasers, it might be permitted to say, to one who has advanced his money on the faith of them, that it had not directed how they should be transferred.

The next allegations of the return are, that the city ordinance, which directed the subscription, provided that the directors of the company should agree with the city in writing to pay the current interest accruing on the bonds; that the subscription should not be made until subscriptions to the amount of $350,000 had been first obtained from responsible sources other than contractors; that the money realized from the sale of the bonds should be expended in the construction of the road nearest Pittsburg; that no bonds should be issued or signed by the Mayor until the survey and location of the road should be first made and agreed upon by the board of directors; and, also, that the Councils should appoint three of their number as a committee under whose control the bonds should be sold, of all which the relator and other holders of the bonds had legal notice, as the defendants believe. The return then proceeds to aver that these conditions were not complied with, and that the company has not paid the current interest, but that it is insolvent.

If the facts thus pleaded can avail the defendants at all, it must be because they show that the city is not liable upon the bonds. If, therefore, these facts be all admitted, and yet the liability of the city to pay the debt exist, they constitute no sufficient answer to the writ. Now, it is to be observed that, by the provisions of the ordinance itself, the Mayor was designated as the agent of the corporation to make the subscription, to execute and issue the bonds, and to enter into the agreement with the company that it should pay the current interest. He was the agent of the city alone. True, he was required not to subscribe, or sign bonds, or issue them, until certain preliminary things, intended for the benefit of the city, had first been done; but, from the nature of his agency, he was to determine whether they had been done. When, therefore, the bonds were issued and came into the hands of a purchaser, he had a right to presume that every thing preliminary to their lawful issue had

been done; for, if it had not, the obligors were in fault. The bonds themselves, though referring to the ordinance, gave the purchaser no notice of any default in the city's agent. The return charges, indeed, that the relator and other bondholders had notice of the ordinance and its requirements; but it does not aver that they had any notice of the alleged facts that those requirements, which were prerequisites to the issue and sale of the bonds, had not been complied with. Those facts are entirely outside of the ordinance itself. Still more, the bonds were created for the purpose of sale. They were intended as a means of raising money for the construction of the railroad. It was with this design that the municipal subscription, payable in bonds, was authorized by the legislature. If it had been required that the company should retain the bonds, they would have been useless in the prosecution of their work, and the purpose of the subscription would have been defeated. It was so understood by the city; for the ordinance speaks of their sale, and requires that the moneys realized from the sale should be expended in the construction of the part of the road nearest to Pittsburg. Accordingly, they were issued in the best form for sale and easy transfer. They were made payable to bearer, and consequently passed by delivery.

Again, the ordinance directed that the bonds should be issued bearing interest, payable half yearly; in other words, that, by them, the city should assume the obligation to pay not only the principal, but the interest, and so the bonds were, in fact, put upon the market.

Now, under these circumstances, it can with no reason be contended that the purchaser of the bonds stands in no better situation than the Chartiers Valley Railroad Company, which received them in payment of the subscription. We have not, it is true, decided that such securities are negotiable in the sense in which bills of exchange and promissory notes are held to be, and in this particular we have not gone so far as the tribunals of our sister States and of England have gone. We carefully avoided so deciding in the case of *The Commonwealth* vs. *The Commissioners of Allegheny County*, and thus left open a door through which that county might, if

she would, secure all the equities which she has. But it has been ruled in this State, that the legal title to a bond of a corporation, payable to bearer, passes by delivery, and that the holder may sue in his own name. *Carr* vs. *Lefevre*, 3 Casey, 413. In other words, the obligor is regarded as having bound himself directly to the holder. In the ordinary case of an assignment of a bond, the assignee doubtless takes the security, subject to a right in the obligor to defalcate against the assignee, or show want of consideration or non-existence of the debt. We speak now of assignments which pass the legal title. But as was said by Gibson, J., in *Davies* vs. *Barr*, 9 S. & R. 141, "With any agreement between the original parties, inconsistent with the purport or legal effect of the instrument, the assignee has nothing to do. The assignee is not bound to call upon the obligor for information about matters, the existence of which he has no reason to suspect; the necessity of inquiry being limited, as I have said, to want of consideration and set-off." This statement is not, indeed, precisely accurate. The obligor may set up against an assignee of the obligee, not only set-off and want of consideration, but he may disprove the existence of the debt. Yet he cannot assert a secret equity, or an agreement merely collateral, and even in the case of an ordinary bond, if it be placed in the hands of an obligee for the purpose of enabling him to raise money upon it, the purchaser is affected by no want of consideration or defence of the obligor against the obligee. Any other rule would be enabling the obligor to perpetrate a fraud, and, indeed, to make use of that fraud to his own advantage. It has often been ruled that if an obligor encourage a transfer of a common bond, he cannot afterwards deny that he owes it, and this, though the transferree hold it only by equitable assignment. The principle of such a ruling applies with double force to bonds made payable to bearer, when the legal title passes by delivery, and which have been issued for the purpose of sale. The purchaser of such a bond has a right to presume that every prerequisite necessary to give force to the instrument has been complied with, especially where it is a prerequisite only for the benefit of the obligor.

That portion of the averment which alleges that one of the con-

ditions upon which the bonds were directed by the ordinance to be issued, was that the company should agree to pay the current interest, and that they were delivered on that condition, comes far short of a denial that the city is liable to pay interest to a purchaser and holder. The agreement of the company to pay current interest was to be an agreement with the city, not with the bondholder. It was for the benefit of the city exclusively that it was demanded, and it could by no possibility affect the right of the holder of the bond. The bonds, as has been seen, were authorized by the ordinance, to bind the city to pay interest, and they were in truth so issued. That it was intended that the holder was to get interest is not denied, but how could he get it except from the city? The agreement of the company was no contract with him, and the transfer of the bond to him could not amount to an assignment of any security for the payment of interest which the obligor held. It would not pass even if it had been an engagement of a third person to the company to pay the interest. *Beckley* vs. *Eckert*, 3 Barr, 292. Much less when it is a promise to the debtor. In *Davies* vs. *Barr*, it was held that with an agreement of the original parties to restrain the use of a bond, an assignee of it had nothing to do. It would be extraordinary, if, in a suit upon a bond against a principal and surety, even the latter could set up as a defence that the principal had agreed to pay the interest, and that therefore he was not liable; but it would be still more extraordinary if the principal debtor could defend himself under such a promise of the surety. Yet, in this case, the company is not so much as surety, so far as relates to the holders of the bonds. True, when the bonds were passed from the company, a guaranty of the principal and interest was endorsed, but if the bonds do not bind the city to pay interest, there is nothing upon which the guaranty can operate. Nor could it make any difference if the holder had notice when he took the security that the company had agreed to pay the interest, for the bond in words gave him the obligation of the city to pay, and whether it be as primary debtor or surety, it could not affect him. We have, however, said enough upon these averments of the return to show that they are wholly insufficient.

Next comes an allegation, not of any fact, but of a supposed principle of law. It is that the bonds, being under the seal of the corporation, are open to every legal defence appearing on their face, and subject to every equity to which they were liable in the hands of the original holders; that all purchasers are affected with notice of such defences, and that the corporation, when sued in a court of law, may avail itself of all such defences, whether legal or equitable. This has already been sufficiently considered, and shown to be only partially correct in its application to this case, not standing at all in the way of the relator's right or the city's liability.

The next averment is but a repetition of what was held in *Commonwealth ex rel. Thomas* vs. *The Commissioners, &c.*, to be wholly insufficient. It is most evasive. Taken as a whole, it is no denial of what the writ asserts—that the relator purchased and is possessed of the bonds.

The assertion that, as to any of the bonds other than those held by the relator, the defendants are not bound to answer in this suit, can hardly be called an averment of any fact. It seems intended, however, as an objection to a supposed misjoinder of parties, and as such, rests upon a plain misconception. The defendants are not called upon to answer several parties, but to respond to the commonwealth for an alleged neglect and refusal to perform official duty. If that duty exist at all, it is to assess and collect taxes to pay the interest upon all the bonds, and that duty is the same whether one or all of the bondholders apply for the writ of mandamus. Tapping, 325. That obedience to the writ may have the effect of perfecting the rights of many, is no objection to a writ presented by one relator.

The twelfth and next averment is double. The defendants deny that the bonds, or any of them, were transferred in accordance with the acts of Assembly, or any of them. They also aver that they are prohibited from laying on any more tax on the valuation of taxable property than is already assessed and required for the ordinary uses of the city.

The defendants do not deny that the bonds were transferred, but only that the transfer was not in accordance with the Acts of Assembly. It would be absurd to hold that such an aver-

ment negatives any material part of the relator's case. If a transfer, according to the acts of Assembly, was necessary, then the return should aver the particular facts which distinguish the transfer from such a one as the statute demands. Such a return as this has been denominated *shuffling*, and held, therefore, to be utterly insufficient. See case cited in Tapping, 352, where the return was that "a rate was not made according to act of Parliament." A writ of mandamus is not to be answered by a frivolous, evasive, or uncertain return. Nor can it be answered by any legal inferences of the defendants from facts not stated. This court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.

The other averment may be considered in connection with the sixteenth substantive allegation of the return, which is more definite and certain. It is declared that the act incorporating the town of Pittsburg into a borough, prohibited the levy of any tax in any one year exceeding half a cent on a dollar on the valuation of taxable property, unless some object of general utility should be thought necessary, in which case a majority of the taxable inhabitants should approve and certify the same in writing; that this act is recognized and adopted in the act defining the powers of the Councils of the city, that the tax now, and for a long time past, required and assessed for the ordinary uses of the city is at the rate of half a cent on the dollar annually, of the valuation, and that a majority of taxables have never, in writing, approved of the subscription or of the levy of any additional tax therefor.

The facts pleaded in these averments, so far as they are facts and not legal conclusions, are admitted by the demurrer; but it is still an open question whether the law does impose upon the Councils such a restriction as to render the performance of the act enjoined by the writ illegal, and therefore impossible. Now, without inquiring how far the powers of the Councils were limited by the act of Assembly incorporating the city of Pittsburg, it need only be noticed, that the very act which authorized the subscription also empowers, and, as we have seen, made it the duty of the city (acting, of course, through its Councils) to provide for the payment of

the principal and interest of the debt incurred by the subscription by the assessment and collection of such a tax as may be necessary for that purpose. If there was any restriction upon the rate of taxation before, which we do not say, it was certainly removed by the act of February 7, 1853, so far as relates to the levy of a tax for the payment of the principal and interest of the debt incurred by the subscription. When the legislature gave the power, it gave with it every thing which was necessary for its exercise, and repealed every statutory prohibition of its enjoyment.

The remaining averments of the return may be disposed of in a few words. That the liability of the city upon its bonds is disputed, and that no judgment has been recovered to warrant a mandamus execution, are wholly insufficient allegations. The defendants must obey the writ or show facts from which this court may determine that the debt is not due by the city, or at least that it is doubtful whether it be due. And this writ is not to be confounded with a mandamus execution. Nor is the pending of a suit upon other bonds than those of the relator at all material, in the absence of any averment of facts which, if true, would amount to a defence. The same matter is not in controversy in that suit, which is contested here.

The seventeenth averment of the return, in which the defendants allege that they cannot, conscientiously, consent to levy a tax, because they do not believe that the relator and other holders of the bonds have any legal claim against the city, certainly has the merit of novelty, as a defence. It will hardly be expected that we should spend time upon that.

The denial of a demand for the interest has already been sufficiently discussed in our notice of the objections taken to the writs. It is not denied that the defendants have refused, and still refuse, to make provision for the payment of the interest. That the company paid until its insolvency, cannot relieve them from liability to provide for the payment of what is in arrears, if the city be liable to pay.

The only other allegations of the return are general averments: that the city is a municipal corporation; that the citizens and property

holders never conferred upon the mayor or councils the power to subscribe for stock in a railroad company; that the bonds were issued under the authority of the legislature without the authority of the inhabitants of the city, and that, therefore, the bonds are not in the nature of a contract. These averments seem intended to negative the policy and the constitutionality of the act of Assembly authorizing the subscription. We shall not discuss them. The impolicy of municipal subscriptions to stock in railroad companies must be admitted; but the constitutionality of laws authorizing them has been sustained, not only in this State, but in our sister States, by a weight and uniformity of judicial decisions, such as very few other constitutional views have been able to bring to their support.

Upon a review of the whole case, therefore, we find ourselves constrained to adjudge the return to the alternative mandamus insufficient. We might have shown that many of its allegations are uncertain, argumentative, or evasive; but, even if the facts alleged be treated as well pleaded, they amount to no justification for a neglect or refusal to make full and ample provision for the payment of the interest upon the bonds (amounting to $150,000) by the assessment and collection of such taxes as may be necessary for the purpose.

Judgment must, therefore, be entered upon the demurrer against the defendants, and a peremptory writ awarded.

And now, to wit: February 13, 1860, this cause having come on for hearing at the last term of the court at Pittsburg, was fully argued by counsel, whereupon the court, after due and mature consideration thereon had, for that it appears that the said return by the said defendants made to the alternative writ is altogether insufficient, do order and adjudge that judgment be entered upon the demurrer for the Commonwealth, and that the defendants and their successors in office be and they are hereby commanded forthwith to make full and ample provision for the payment of all the interest now due upon the bonds issued by the mayor, aldermen, and citizens of Pittsburg, in payment of their subscription of $150,000 to the capital stock of the Charters' Valley Railroad Company, according to the tenor of said bonds, by the assessment and collection of such taxes as may be necessary for the purpose. And it is further ordered that the defendants pay the costs of this suit.